No. 75-1893

In the Supreme Court of the United States

OCTOBER TERM, 1976

DOMINIC TORTORELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner challenges the admissibility against him of certain evidence that he claims was illegally seized.

Petitioner and a co-defendant were indicted in the United States District Court for the Southern District of New York on the charge that they unlawfully received, concealed, and stored 250 boxes of coffee moving as part of an interstate shipment, knowing them to have been stolen, in violation of 18 U.S.C. 2315. On petitioner's motion, the district court entered a pre-trial order suppressing evidence concerning the coffee on the ground that it was discovered as a result of two unlawful searches. The district court also suppressed certain statements made by petitioner at the time of the searches.

The government appealed. The court of appeals, in a thorough opinion, reversed the suppression order, holding that petitioner lacked standing to challenge the lawfulness of one of the searches and that he validly consented to the other (Pet. App. 4a-15a).[1]

Petitioner presents no fewer than nine questions relating to the court of appeals' interlocutory judgment (Pet. 2-3). Even if the case were ripe for review by writ of certiorari at this stage—which we doubt (see, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327)—none of the questions presented would warrant further review.

1. Petitioner argues that the court of appeals should have considered itself bound by the government's "concession" (Pet. 10) in the district court that petitioner had standing to challenge one of the searches. It is settled, however, that a court is "not bound to accept, as controlling, stipulations as to questions of law." *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 51.

2. Nor was the government's statutory right to appeal "waived" (Pet. 5) by its initial oral advice to the district court that no appeal was contemplated. The government, no less than private litigants, is entitled to change its plans. The notice of appeal was timely filed, and petitioner points to no prejudice that he suffered as a consequence of the government's initial advice to the court.

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[1]The judgment of the court of appeals (Pet. App. 2a-3a) was entered on April 1, 1976, and a petition for rehearing was denied on May 14, 1976 (Pet. App. 1a-2a). On June 15, 1976, Mr. Justice Marshall denied, for failure to comply with Rule 34(2) of this Court's Rules, an application for an extension of time within which to file a petition for a writ of certiorari. The petition was not filed until June 29, 1976, and is therefore out of time under Rule 22(2).

3. On the merits, petitioner contends that he had "automatic standing" under *Jones* v. *United States*, 362 U.S. 257, to challenge the lawfulness of the search of a garage on his parents' premises. But, as the court of appeals correctly held, the automatic standing rule, even assuming its continued vitality, has no application here because "the Government has not charged [petitioner] with possession of the coffee found in the garage at the time of the illegal search" (Pet. App. 12a). See *Brown* v. *United States*, 411 U.S. 223, 229.

4. Petitioner argues that his consent to a search of the basement of his parents' house—a search that revealed the 250 boxes of coffee that he was charged with having unlawfully received—was invalid because (a) he had no right to consent to the search, (b) his consent was tainted by the prior unlawful search of the garage, and (c) the law enforcement agents had time to obtain a warrant.

First, whether or not petitioner's consent to the search would have been conclusive with respect to the rights of other persons, "he is bound by his [own] consent" (Pet. App. 13a). He thereby waived whatever rights *he* had to object to the search.

Second, although petitioner gave his consent to a search of the basement after the agents informed him that they had seen coffee in the garage, the validity of that consent is not tainted by the unlawfulness of the search of the garage. As the court of appeals correctly held, since petitioner "had no standing to contest the lawfulness of the garage search, the information obtained from that search was not illegally obtained *as far as* [*petitioner*] *is concerned.* * * * It follows that the unlawful search of the garage did not invalidate [petitioner's] consent [to] the search of the basement" (Pet. App. 14a; emphasis in original).

Third, the availability of a warrant is wholly immaterial if, as here, a search is conducted with valid consent.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1976.

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